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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 27

JAMES V. GILES AND JOHN G. GILES,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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IN THE
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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (R. 292-315) is reported at 239 Md. 458, 212 A. 2d 101. The opinion of the Circuit Court for Montgomery County, Maryland (R. 281-292) has not been officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitioners' Brief.

QUESTIONS PRESENTED

1. Whether petitioners were convicted in violation of the Fourteenth Amendment to the United States Constitution by reason of any suppression by the State of material exculpatory evidence?

2. Whether petitioners were denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution by reason of the fact that the Maryland courts have retained the power to determine the admissibility of evidence despite the Maryland constitutional provision that the jury is the judge of the law as well as the fact?

3. Whether the due process clause of the Fourteenth Amendment guarantees one the right to file a motion for new trial after conviction for a criminal offense; and whether petitioners were denied due process under the then applicable, but subsequently amended, procedural rule which provided that new trial motions based on newly discovered evidence must be filed within three days after judgment?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Maryland Constitution, statutes, and rules appear in the Appendix to the Petitioners' Brief with the exception of Rules 728, 764 and 922 of the Maryland Rules of Procedure which are set forth in Respondent's Appendix A, *infra*.

STATEMENT OF THE CASE

The judgment under review is the culmination of a proceeding brought under Maryland's Post Conviction Procedure Act, Maryland Code (1957), Article 27, Section 645 A-J, set forth, in pertinent part, in Appendix A of the

Brief for Petitioners. Petitioners originally were convicted of rape in the Circuit Court for Montgomery County, Maryland, by a jury, on December 5, 1961. The trial court (Judge James H. Pugh) sentenced Petitioners to death. The convictions were affirmed by the Court of Appeals of Maryland, *Giles v. State*, 229 Md. 370, 183 A. 2d 359, and an appeal to this Court was dismissed for want of a substantial federal question. *Giles v. Maryland*, 372 U.S. 767. Subsequently, Petitioners moved in the trial court for a new trial on grounds of newly discovered evidence. The Motion was denied by the trial court; and the denial was affirmed by the Court of Appeals of Maryland, *Giles v. State*, 231 Md. 387, 190 A. 2d 627. On October 24, 1963, the Governor of Maryland, Honorable J. Millard Tawes, commuted Petitioners' sentences to life imprisonment.

Petitioners then filed a petition under the Post Conviction Procedure Act alleging that their convictions were unconstitutionally procured (R. 1-27). Following an evidentiary hearing, the Circuit Court for Montgomery County ordered a new trial on the ground that Petitioners had been denied due process of law under the Fourteenth Amendment by reason of the State's suppression of evidence at their criminal trial (R. 291-292). On appeal by the State, the Court of Appeals of Maryland, sitting en banc, reversed, two judges dissenting (R. 292-315). *State v. Giles*, 239 Md. 458, 212 A. 2d 101.

A. THE CRIMINAL PROCEEDINGS¹

The following evidence was presented at the criminal trial:

On the night of July 20, 1961, Joyce Roberts (age 16), her boyfriend, Stewart Foster, and two other young men,

¹ The transcript of the criminal trial (R. 29-157) was admitted into evidence in the post-conviction hearing (R. 157-158).

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rode by automobile to a secluded area in Montgomery County, Maryland, along the Patuxent River for the purpose of going swimming. By previous arrangement they were to meet several other persons there, including one of Joyce Roberts' girl friends who was to bring Joyce's bathing suit with her (R. 61). Their friends failing to appear within a few minutes, the group started to leave the area and went a short distance when the car ran out of gas (R. 35). Two of the young men set out to get gas, leaving Joyce Roberts and Stewart Foster in the stalled vehicle. The area was thickly wooded, very dark, and desolate, the nearest residence located approximately one block away, being unobservable because of the heavy foliage (R. 78).

Shortly after the others departed, the stranded couple saw four negro men (John Giles, James Giles, Joseph Johnson, and John Bowie) placing fishing gear in the trunk of Bowie's automobile, which was parked nearby. The four men guided Bowie's car past the stranded vehicle with the assistance of Stewart Foster, who inquired if they had sufficient room to pass (R. 35).³ Once past the stalled vehicle, three of the men (the Gileses and Johnson) began to walk back to the stranded vehicle (R. 35). Foster became frightened, rolled up the car windows, and locked the doors (R. 36). The trio demanded money and ciga-

³ John Bowie testified for the State that at that time he saw both Foster and Joyce Roberts in the stalled vehicle (R. 32). John Giles testified that he was unaware that anyone was in the car other than Foster (R. 104); James Giles also related that he was unaware that a girl was in the car (R. 131).

Joseph Johnson did not testify at the Petitioners' trial. He was also indicted for rape but his case was severed and removed to another county. His conviction was affirmed in *Johnson v. State*, 232 Md. 199, 192 A. 2d 506. His death sentence was commuted by the Governor to life imprisonment at the same time as the commutation of Petitioners' sentences.

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rettes, but Foster told them he had neither (R. 36). The three men refused a request of Bowie that they leave with him (R. 33, 36); and Bowie drove off. An argument ensued.³

The colored men went to the rear of the car where one alleged shouted: "Let's drag his fucking ass out of there and get some of that pussy" (R. 85). Other threats were allegedly made to drag Foster from the car and carnally know the girl (R. 36). One or more of the intruders then threw rocks at the automobile, shattering the windows, and allowing them to reach in and unlock the doors.⁴

Foster then jumped from the automobile to hold off the attack and was struck in the face with a rock and rendered unconscious (R. 37). Joyce, at the same time, got out of the other side of the vehicle and fled into the woods. She had gone a short distance when she tripped and fell.⁵ Out

³ The Giles brothers testified at the criminal trial that Foster called them obscene racist names without provocation (R. 103, 122, 131, 133). This was denied by Joyce Roberts (R. 53), and also by Foster (R. 43), who related that he knew better than to provoke an argument especially when outnumbered three to one (R. 43). The Giles brothers also testified that Foster leaned down in the car as if reaching for a gun (R. 104, 122, 134). In statements made to the police shortly after their arrests, the Gileses denied any knowledge of the cause of the argument, and they also made no mention of Foster appearing to reach for a gun (R. 85-87, 91-92, 95).

⁴ As this happened, Foster testified:

"And I said 'You aren't going to get the girl', and they said 'Well I will kill your fucking ass' and I heard a brick go through the window and one of them said 'Let's shoot the son-of-a-bitch.'"

"* * * I was so scared and I said 'Joyce make a run for it and I will hold them back as long as I can'" (R. 36-37).

⁵ Sergeant Alton Duvall, of the Montgomery County Police, the first officer to arrive at the scene, placed the distance as approximately 100 feet from the automobile (R. 76); although Joyce Roberts stated that she thought she only had gone approximately 30 feet (R. 54).

of breath and unable to run further, she lay quiet in the thick underbrush trying to hide (R. 54).

The Petitioners and Johnson then separated and sought Joyce in the woods. John Giles was the first to find her. According to the girl, he laid on top of her until the other two arrived (R. 55, 66). She also claimed that she pleaded with John Giles to let her go further back into the woods so that the other two couldn't find her, telling him that he could follow her later. As to this she reasoned: "I thought if I could get away from him, I could get away from all of them" (R. 55).

Upon discovery of Joyce and John Giles by the other two (according to the testimony of the prosecutrix), the men all leaned over her, began kissing her, and one reached for the zipper on her shorts (R. 55). Joyce, according to her version, protested but was told "either you do it or we will do it" (R. 56). Completely dazed (R. 56), alone in the woods with three demonstrably violent young men, afraid for her life (R. 71), she complied with their demand and removed her shorts (R. 56). She then withstood successive rapes, first by John Giles, then by Joseph Johnson, finally by James Giles (R. 56). During the final attack, Joyce heard Foster, who had regained consciousness, cry out that he was going to get the police, but before she could call to him for help, she heard him running off (R. 56).

Joyce related that the acts of intercourse were forcibly had against her will and without her consent (R. 55-56, 64, 66, 71).^{*} According to the Giles brothers on the other

^{*} Joyce's testimony, in part, was as follows:

"A. One of the boys reached for the zipper in my shorts and I said 'No' and one of them said 'Either you do it or we will do

hand, Joyce urged and insisted that they and Johnson have intercourse with her. James Giles and Johnson accepted the "invitation" (Petitioners' Brief, p. 5); John Giles denied having intercourse despite the alleged solicitation by the prosecuting witness.

John Giles testified that he followed the person who had jumped out of the car and who had run into the woods, not even knowing at the time that it was a female (R. 110-111). He related that he was simply walking through the woods when a girl called to him (R. 104, 112); that he was not looking for and did not find her, but rather that "She found me" (R. 112); and that although she "insisted" (R. 105, 113) that they have intercourse, he refused. He remained with her five or ten minutes before the others came, according to Joyce (R. 66); for ten to fifteen minutes, according to John Giles (R. 114-115). When the others arrived John Giles testified that the prosecuting witness made the statement "I know what you boys like", and that she began to take off her clothes (R. 115).

it' and so I said 'I will' and I took my shorts and underpants off.

"Q. Why did you do that? A. I was completely dazed. There wasn't anyone to yell to for help, there wasn't anything I could do, and they were all there standing around me.

"Q. Did you scream? A. No, there wasn't any sense in screaming" (R. 56).

The witness also related later in her testimony:

"A. Well the whole time I was there I was afraid to do anything against them, because I was afraid they would use violence.

"Q. Why didn't you scream? A. I didn't know there was anyone there to scream to.

"Q. Why didn't you hit at these boys? A. Because I was afraid they would hit back.

"Q. And why did you let them have intercourse with you? A. Because they had chased me, and I was afraid for my life" (R. 71).

According to James Giles, he went into the woods only to look for his brother, and not for the girl (R. 124, 131). He claimed that Joyce called to him and Johnson (R. 124); that she asked where he and Johnson had been so long (R. 124) and that "the next thing she started to take her clothes off" (R. 124). He also claimed that the girl insisted upon intercourse, made no protest, and assisted in every way (R. 127). He did not know whether John Giles engaged in intercourse with the girl, although he admitted that John spent about ten minutes with her while he and Johnson waited nearby (R. 142).

After regaining consciousness, Foster heard Joyce "whimpering" in the woods (R. 37, 43).¹ He made his way to the nearest home where the police were called. Within minutes, at approximately 12:55 A.M., Sergeant Alton Duvall of the Montgomery County Police Department arrived on the scene. The Petitioners and Johnson fled through the woods after seeing the headlights of the police car (R. 57). The officer related that Foster was "very hysterical" (R. 74), was bleeding at the mouth, and was covered with blood (R. 74). Joyce was found lying on the ground, naked for the most part, except that she had on a white blouse (R. 74).² She was sobbing and in a "semi-conscious state" (R. 75). The officer and Foster had to pick Joyce up bodily and help put her clothes on (R. 75). She and Foster were taken by ambulance to a hospital. Examination revealed that she had abrasions and scrapes of the skin over her shoulders, her knees, and her legs; that fragments of earth and leaves were adherent to her back, and that secretions containing numerous spermatozoa cells

¹ Foster did not regain consciousness until the final attack upon Joyce Roberts was in progress (R. 56).

² The Petitioners claimed that Joyce Roberts voluntarily disrobed herself, and neatly folded up her clothes (R. 115, 126).

were found in her vagina (R. 45), showing recent intercourse. Foster received eight sutures in his upper lip (R. 46, 38).

James Giles was arrested at his home the next morning, having spent the night hiding in the woods (R. 127). John Giles was arrested on July 23rd, having spent most of the two intervening days hiding in the woods (R. 117). Joyce identified James Giles at a police line-up on July 21st, and John Giles at a line-up held on July 23rd (R. 57, 58).

In a statement to the police following his arrest, James Giles admitted that he had thrown rocks at the automobile; that he was aware that the automobile was occupied by a white male and a white female; that an argument had started after someone asked Stewart Foster for a cigarette, but that he did not remember what caused the argument, or what was said; that he was drunk; that he assisted in attacking Foster and later robbed him; that he and Johnson ran into the woods looking for John Giles and the white girl; that after finding them he argued with his brother as to who would be the first to have intercourse with her; that John Giles had intercourse first, followed by Johnson and then himself. He further admitted that it might have been he who made the statement, "Let's drag his fucking ass out of there and get some of that pussy" (R. 85-87). He did not remember whether the girl disrobed herself (R. 95). When asked what he would have done if he had been in Joyce Robert's predicament, he replied "Cooperate, I guess" (R. 97).

John Giles, in his statement, admitted that he was present at the crime scene; that he did not know why an argument started at the car or whether or not he personally broke any of the car windows; that when the white

female jumped out of the car he immediately chased her into the woods; that he stayed with her for approximately fifteen minutes; but denied that he had intercourse with her (R. 91-92).

At the trial Petitioners testified that the reason for breaking into the car was to prevent Foster, whom they said had a gun in it, from shooting them (R. 109). No weapon of any sort was found in the car or in the area and none was introduced into evidence. It was further related by the Petitioners at the trial that Joyce Roberts told them that she was on a year's probation, didn't want to get into trouble, and if caught by the police would have to tell them that she was raped (R. 104, 105, 112, 113, 127, 140, 146). This was denied by the girl (R. 69, 70). She also denied making any statement to the effect that she had had intercourse with numerous other boys that week and that a few more would not make any difference (R. 69), as had been urged by the Petitioners (R. 112, 124-127).

The jury returned verdicts of guilty against each Petitioner without qualification as to sentence (R. 154).

B. THE POST-CONVICTION PROCEEDING

On May 11, 1964, Petitioners filed in the Circuit Court for Montgomery County a petition under Maryland's Post Conviction Procedure Act (R. 1-27), seeking to collaterally attack their convictions as having been procured in violation of the due process clause of the Fourteenth Amendment in various respects, of which the following claims survive: (a) that the State suppressed material exculpatory evidence, (b) that the Maryland procedural rule requiring that new trial motions based on new-discovered

evidence be filed within three days after verdict prevented Petitioners from proving any newly discovered evidence.⁹

A three-day evidentiary hearing was conducted in July, 1964, to determine the merits of the Petitioners' allegations.

1. *The Alleged Suppression of Evidence.*

The most significant evidence presented at the post conviction hearing involved an alleged suicide attempt by the prosecutrix and an alleged false rape claim. About five weeks after the attacks (of July 20, 1961) upon Joyce Roberts by the Petitioners and Joseph Johnson, she attended a party in Edmondston, Prince George's County, Maryland. There she had intercourse with one boy who had followed her into a bathroom, and with another in the yard outside the house (R. 23-27, 182-4, 296). Her physical resistance to these acts, if any, was slight, her main concern appearing to be that all of the boys at the party would find out and desire to have intercourse with her (R. 190).

The following morning, August 27, 1961, Joyce was admitted to Prince George's General Hospital, having taken an overdose of pills. The hospital record¹⁰ showed a diagnosis of attempted suicide (R. 279); and the history section of the report showed that: "Patient raped several weeks ago. This present episode is result of parental arguing, incompatibility with parents, and difficult adjustment."

⁹ The Petitioners also claimed in their petition under the Post Conviction Procedure Act that their convictions were procured by the use of perjured testimony which the State induced (R. 1, 4). This claim has apparently been abandoned.

¹⁰ There was no evidence that any person connected with the State in any capacity, including the prosecution, ever inspected or was aware of the contents of the hospital record.

(R. 280). She was given an admitting diagnosis of psychopathic personality and placed in a psychiatric ward before discharge nine days later. The attending physician diagnosed the condition as an adolescent reaction (R. 164).

While in the hospital, Joyce was visited by a friend, Robert Bostic. Joyce told him that she had taken the pills because she had been raped at the August 26 party. Bostic relayed this information to Joyce's mother, without Joyce's knowledge. The prosecutrix's father then made a complaint of the alleged rape by telephone to Lieutenant Lloyd Whalen of the Montgomery County Police Department¹¹ who told Joyce's father to contact the Prince George's County police, since the alleged rape had occurred in the latter county (R. 23-27, 179, 184, 192, 284-85, 296).

As a result of the complaint by Joyce's father to the Prince George's County police, Detective Sergeant Wheeler visited the hospital on September 1, 1961. He did not then know that Joyce was the complainant in a rape case in Montgomery county (R. 187); nor could he remember whether he learned this fact before or after the criminal trial in December, 1961 (R. 188). As to the reason for the girl being in the hospital, Wheeler stated that he believed he had been advised that she had taken an overdose of some kind of tablets, although he was uncertain (R. 189). At the hospital, after relating the incident at the party of August 26, Joyce stated to Wheeler that she did not wish to make any complaint of rape and that she had never authorized anyone to make such a complaint for her. She further related that she would refuse to testify against the two boys if the matter was pressed. Wheeler marked the Prince George's County police file "Closed and un-

¹¹ Lieutenant Whalen was in charge of the investigation of the alleged rape of Joyce Roberts by Petitioners and Johnson (R. 195).

founded," with the consent of Joyce's father (R. 23-27, 179-85, 189-92, 296-97). Joyce also related to Wheeler that during the preceding two years she had engaged in numerous acts of intercourse with different persons, including one of the two boys with whom she had engaged in intercourse at the party.

Wheeler did not communicate his information to the Montgomery County authorities; he was not interviewed by the State's Attorney or police of Montgomery County, and it is clear that neither the State's Attorney nor the officer in charge of the investigation in Montgomery County knew of the facts obtained by Wheeler (R. 198-200, 252-54).¹²

Lieutenant Whalen, of the Montgomery County Police, was in charge of the investigation of the alleged rape of Joyce Roberts by the Petitioners and Johnson (R. 195). When contacted by the father of Joyce Roberts concerning the incident of August 26 which had taken place in Prince George's County, he advised Mr. Roberts to contact the authorities of that county. Whalen made no investigation of the complaint (R. 199-200); and had no knowledge of any of the details of the incident (R. 199-200). He was told by Joyce's mother at a later date that Joyce had taken some sleeping pills and was hospitalized (R. 199); but Whalen was never informed that Joyce had attempted suicide (R. 198-199, 231, 297).¹³

¹² The Court of Appeals held that for the purposes of the suppression doctrine, the prosecution was charged only with the knowledge of the Montgomery County Police, but not with knowledge of the police of other counties (R. 103). Petitioners admit that the Montgomery County police and State's Attorney were unaware of the facts obtained by Detective Sergeant Wheeler of the Prince George's County police. Petitioners' Brief, pp. 9, 11.

¹³ Mrs. Marion Roberts, mother of Joyce, called as a witness by the Petitioners, related that she told Lieutenant Whalen that Joyce had

Although he was aware of the fact that Joyce's mother had at one time taken her to see a psychiatrist,¹⁴ he did not have any information that Joyce was mentally ill or mentally disturbed (R. 198, 201, 297, 304).

The State's Attorney for Montgomery County, Leonard T. Kardy, testified that although he knew prior to the trial of the criminal case that Joyce Roberts had been hospitalized for taking excessive drugs, he had no information that this was a suicide attempt (R. 251-252, 297). He made no inquiry or attempt to find out what caused the drugs to be taken (R. 252), and assumed that it might have been connected with the July 20 incident involving the Petitioners and Johnson (R. 252). He had been informed of the rape complaint in Prince George's County involving Joyce Roberts, in which the charge was made by one other than Joyce, and he also was aware that the charge had been investigated and dropped (R. 252-253, 297). He had no information to the effect that Joyce Roberts was mentally or emotionally disturbed (R. 250, 253). He received no information concerning L.'s reputation for chastity (R. 254); and had no knowledge of anything that reflected adversely upon her credibility (R. 255). The prosecutor related that he had in fact interviewed the prosecuting witness at length concerning the events of July 20 and felt that she was telling the truth (R. 214, 260); and that her testimony from the witness stand was consistent with prior statements she had made (R. 260). He emphatically denied concealing or suppress-

taken some pills, but Mrs. Roberts denied telling Lieutenant Whalen that Joyce had attempted suicide. In fact, the witness, herself, disclaimed knowledge that Joyce had attempted suicide (R. 231).

¹⁴ Lieutenant Whalen was informed by Mrs. Roberts that Joyce had at one time been taken by her to a psychiatrist (R. 201). The reason for the visit was not related to Lieutenant Whalen, and was only known by the mother (R. 201, 304).

ing any information which he thought was admissible, exculpatory evidence (R. 280-282).

A psychiatrist, who had not examined the prosecutrix (R. 244) related in answer to a hypothetical question, that in his opinion, a teen-ager's attempted suicide evidenced a mental disorder. He stated, however, that many conditions not derived from mental illness could cause an attempted suicide. He further admitted that he could not state an opinion as to the girl's mental condition at the date of the trial (R. 237-243).

The psychiatrist who had examined Joyce in the Prince George's General Hospital shortly after the alleged suicide attempt was not called to testify by the Petitioners.¹⁵ Petitioners also did not call the prosecutrix to testify at the hearing, although she was available for such purpose (R. 236). Other evidence, consisting of affidavits by acquaintances of the prosecutrix, was entered into the record, indicating that she was a sexually promiscuous girl.

As part of their defense at the criminal trial, the Petitioners claimed that the prosecutrix had told them at the scene of the alleged crime that she was on probation, and if caught would have to claim that she was raped. At the time of the alleged rapes (July 20, 1961) there was pending in the Juvenile Court for Prince George's County a petition alleging that Joyce was beyond parental control, and also a recommendation of the court's case worker that Joyce be placed on probation (R. 174). It was stipulated, however, that at the time of the alleged rapes Joyce Roberts

¹⁵ The psychiatrist had been summoned by the Petitioners but did not appear at the hearing. The trial judge offered to issue a warrant for the doctor and to continue the hearing in order to permit the Petitioners to have him testify at a later date. The Petitioners refused the offer (R. 172).

was not on probation in the Juvenile Court for Prince George's County (R. 174). Nor was she on probation in any other court.

Both the lower court (R. 289) and the Court of Appeals (R. 306) held that there was nothing in the record to show a withholding of evidence concerning this issue. The Petitioners also now admit that neither the State's Attorney nor the police of Montgomery County had any knowledge of facts concerning the "near probation status" of the prosecutrix (Petitioners' Brief, p. 13).¹⁶

It was shown that shortly after their arrests, an able and experienced member of the Maryland Bar, Stedman Prescott, Jr.,¹⁷ was appointed by the court to represent the Petitioners. He made an investigation of the case which included, among other things, a discussion of the matter with the State's Attorney for Montgomery County, and an examination of the entire file of the prosecution, including all reports contained therein (R. 214-215, 260-261). He was advised of the names of all State's witnesses (R. 261). The trial did not take place until December, 1961, months after the attorney's appointment to the case, and ample time for preparation was allowed. No other request for information or further assistance of the State's Attorney was made (R. 261).

Defense counsel learned of the facts surrounding the alleged consent of the prosecutrix from his clients and

¹⁶ Juvenile Court records were available to defense counsel under the procedure set out in Rule 922 of the Maryland Rules of Procedure (Appendix A, *infra*) whereby written permission of the court must first be obtained. Such permission was not sought by defense counsel.

¹⁷ Appointed counsel had been a member of the Maryland Bar since 1946; and had vast experience in the trial of criminal cases. He had served as an Assistant Attorney General of the State of Maryland and also as Deputy Attorney General of Maryland (R. 214).

knew this would play an important role in the defense.¹⁸ He did not, however, discuss the case personally with Joyce Roberts because of her mother's denial of such permission (R. 211).¹⁹ The attorney sought to examine the records of the juvenile courts in Montgomery and Prince George's Counties, but was not allowed to see those records by juvenile authorities. The juvenile authorities denied access because under Rule 922 of the Maryland Rules of Procedure (Appendix A, *infra*) such records may only be examined upon written permission of the court. Such permission was not sought by defense counsel prior to trial.²⁰

Defense counsel also admitted upon questioning by the court that he had no information that any witness committed perjury with knowledge of the State's Attorney; that he had no knowledge that the State's Attorney suborned perjury; and that he had no knowledge that the State's Attorney suppressed any evidence which might have been beneficial to the Petitioners (R. 216).²¹

¹⁸ The Court of Appeals pointed out: "By the Gileses version of the incident of July 20, 1961, as related to their attorney, the defense certainly had some question as to the character of the prosecutrix which properly could have been investigated" (R. 306).

¹⁹ There is no indication in the record that defense counsel sought to interview any of the State's witnesses other than Joyce Roberts. He had been advised of the names of all prospective witnesses (R. 261).

²⁰ Defense counsel also made no request of the State's Attorney for assistance in obtaining any juvenile court records. The State's Attorney testified that had such a request been made of him, he would have helped defense counsel obtain the information sought (R. 261-262).

²¹ The Petitioners seem to infer (Petitioners' Brief, footnote No. 5, page 11) that the State's Attorney, along with Lieutenant Whalen, improperly had Joyce Roberts removed from her home and placed in "protective custody" in a State school for girls under order of the Juvenile Court for Montgomery County. The record is clear that Joyce Roberts was placed in the state school to protect her from violence at the hands of others; and that Mrs. Marion Roberts,

2. *The Maryland Rule on Newly Discovered Evidence.*

On November 16, 1962, nearly one year after their convictions (December 11, 1961) Petitioners filed in the Circuit Court for Montgomery County a motion for new trial based upon allegedly newly discovered evidence. The motion was denied as not being filed within the then existing three day time limit set by Rules 567 and 759 of the Maryland Rules of Procedure (Appendix A, Petitioners' Brief).²² The Court of Appeals of Maryland affirmed the denial on the same grounds, *Giles v. State*, 231 Md. 387, 190 A. 2d 627.

The Petitioners' present attack upon the constitutionality of the Maryland procedure was decided adversely to them by both the post conviction trial court (R. 291) and the Maryland Court of Appeals (R. 299). The Court of Appeals stated that the rule was a valid and constitutional procedural requirement (R. 299).²³

mother of Joyce, initiated such action and requested Lieutenant Whalen to take appropriate legal steps (R. 204-206, 221-222, 226-227, 231-232, 249-251). Under no circumstances can any impropriety on the part of any State official be read into this event.

²² Under Maryland Rule 764 (Appendix A, *infra*) effective September 1, 1965, a new trial on the ground of newly discovered evidence which by due diligence could not have been discovered within three days after verdict may be granted if a motion is filed within ninety days after the imposition of sentence or within ninety days after receipt by the trial court of a mandate issued by the Court of Appeals upon affirmance of the judgment or dismissal of appeal.

²³ There is some doubt as to the right of the Petitioners to now raise this question. The issue was decided adversely to the Petitioners at the post conviction hearing (R. 291); and although relief was granted by the post conviction trial court based upon the suppression claim, the issue of the legality of the Maryland procedural rule concerning new trial motions based upon newly discovered evidence was not properly raised by Petitioners in the Court of Appeals of Maryland because they failed to file a cross-appeal to the appeal filed by the State based on the suppression question. The Court of Appeals questioned the standing of the Petitioners to have that Court

SUMMARY OF ARGUMENT

I.

Prosecutors should not, and legitimately cannot, be charged with constructive knowledge of information concerning a State's witness known only by persons other than those actively engaged in "the prosecution". Nor should prosecutors be charged with constructive knowledge of information contained in any remote document having information relating to a State's witness in a criminal case. The authorities and reason maintain that, for the purposes of the suppression doctrine, the prosecution at most, may be charged with knowledge of the investigating police. The information which legitimately could be said to have been known by the prosecution in this case was insufficient to support a suppression claim.

The obligation which the Petitioners seek to impose upon the prosecution (with regard to the duty not only to discover evidence, but also to disclose evidence) is nearly without limitation. The doctrine and precedent sought would have untoward effects; is not demanded by the due process clause; and, under the facts of this case, is unwarranted.

II.

In *Giles v. Maryland*, 372 U.S. 767, this Court dismissed for want of a substantial federal question the Petitioners' due process and equal protection attack upon the validity of the Maryland constitutional provision making the jury in criminal cases "the Judges of Law". That decision in-

consider the claim, and the Court of Appeals made no finding or determination that the matter was in fact properly raised (R. 298-99). The Court of Appeals stated: "Assuming, without deciding, therefore, that the appellees [the Gileses] are entitled to reassert the contentions raised below, they lack substance for the reasons hereafter stated" (R. 299).

volved an adjudication on the merits — with all of its consequences.

The Maryland Court of Appeals did not substitute its judgment for that of the jury (in an "erratically selected" class of cases or otherwise) for under the Maryland doctrine, it is the Court, not the jury which passes on the admissibility of evidence. In this case, the allegedly suppressed evidence was not admissible.

III.

The due process clause does not require a state to provide appellate review of criminal convictions, nor does that clause give an accused the right to a new trial based upon allegedly newly discovered evidence. The Maryland rule in existence at the time of the Petitioners' conviction, which provides that new trial motions must be filed within three days has not prevented the Petitioners from pursuing their claim of innocence. The fact that a particular time limit is set in such type of rule does not render it constitutionally invalid.

ARGUMENT

I.

THE PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW. THE EVIDENCE WHICH THE PROSECUTION COULD BE PROPERLY CHARGED WITH KNOWING WAS NOT MATERIAL EXCULPATORY EVIDENCE.

A. THE EXTENT OF THE PROSECUTION'S KNOWLEDGE

One of the basic questions posed by this case is: Whose knowledge constitutes knowledge of the prosecution? The Petitioners seemingly claim that at least knowledge of any state law enforcement officer is synonymous with knowledge of "the prosecution" (R. 34-38). Thus, although they

admit that the prosecutor and police of Montgomery County did not have actual knowledge of certain information known by Prince George's County law enforcement officials, the Petitioners contend that the Montgomery County officials must be charged with constructive knowledge of that information (R. 34-38).

We claim that such a proposition is unfounded in reason, unsupported by authority, and as the Court of Appeals found "would impose a practically impossible and unworkable burden on local authorities" (R. 303). The Court of Appeals stated that a reasonable rule would be to charge the prosecutor and his agents who have the duty of preparing and presenting a particular case "with knowledge of all seemingly pertinent facts related to the charge which are known to the police department who represent the local subdivision that has jurisdiction to try the case." (R. 303). Under this rule the Montgomery County prosecutor and his agents would be charged with knowledge of those facts known to the police department of that county.

Under no circumstances does the rule give the defense a legitimate cause to complain. It may, in fact, prove to be too broad (from the prosecution standpoint) as it is. It may be argued, for example, that the rule does not limit itself only to knowledge held by those police officers of the local subdivision actually investigating a particular case and who would be in a position to ascertain the utility of a specific bit of information, but also may encompass knowledge of facts held by any police officer of the local subdivision who is himself not only unaware of the significance of the information, but may also be unaware of the fact that a particular investigation is even being made.

Further, it is obvious that in any criminal investigation, numerous bits of evidence are accumulated. Many of

these are so innocuous that they are never used, others are clearly immaterial. Much evidence is ferreted out by the investigating police before the matter is turned over to the State's Attorney for prosecution. Every scintilla of proof need not be given in the process.

We do not here challenge the sagacity of the rule as announced, but point out that a heavy responsibility may be placed on prosecutors by it. Any extension, especially such as that sought by the defense, would have onerous implications. In this regard notice should also be taken of the fact that the defense seeks to charge the prosecutor not only with knowledge of the police department of Prince George's County, but also with knowledge of Juvenile Court authorities of that county (Petitioners' Brief, p. 34), and even apparently with knowledge of the contents of a record of one of the hospitals of that county.

Prosecutors should not, and legitimately cannot, be charged with all of the knowledge possessed by any State law enforcement official wherever located. Nor should they be charged with the knowledge of information contained in any remote document having information relating to a State's witness in a criminal case. Such must be the case, otherwise the prosecution would be held responsible for every single piece of information relating to a State's witness in a criminal case known by any public official in the entire State without regard to the connection of such official to the prosecution of the case or his knowledge thereof.

The cases hold that for the purposes of the suppression doctrine the prosecution, at most, is charged with the knowledge of the investigating police. *Barbee v. Warden*, 231 F. 2d 842 (4th Cir. 1964); *Hall v. Warden*, 222 Md. 590, 158 A. 2d 316. The Petitioners have cited no authority,

and apparently none can be found, whereby the prosecution has been charged with knowledge of the police of another county. See *United States v. Lawrenson*, 298 F. 2d 880 (4th Cir.) where information known by members of the Washington office of the F.B.I. was held not imputable to agents investigating the case who were assigned to the Baltimore office of the F.B.I.; and *Taylor v. United States*, 229 F. 2d 826 (8th Cir.), a case dealing with the alleged use of perjured testimony, where knowledge of the contents of a record of the United States Narcotic Bureau was held not imputable to an agent thereof, nor to a prosecutor, who had no actual knowledge of its contents. In cases dealing with the use of perjured testimony it is the knowing and intentional use of the perjury by the prosecution that renders the judgment void. See *Owens v. Hunter*, 169 F. 2d 971 (10th Cir.) and cases therein cited. *Mooney v. Holohan*, 294 U.S. 103.

We are concerned, consequently, only with the knowledge of Detective Lieutenant Whalen and State's Attorney Kardy. Admittedly, neither knew of the alleged sexual promiscuity of the prosecutrix (Petitioners' Brief p. 34).

The only information which Whalen had concerning the rape complaint relating to the August 28 incident was the telephone call from the father of Joyce, whom he advised to contact the proper authorities of Prince George's County. Whalen made no investigation of the telephone complaint, and had no knowledge of any of the details of the incident (R. 199-200). The only information that he had concerning the alleged suicide attempt was that Joyce had taken some sleeping pills and was hospitalized (R. 199). This information was supplied at a later date, apparently by Mrs. Roberts (R. 199). He was never informed that Joyce Roberts had attempted suicide; and he denied any knowledge that Joyce intentionally took the overdose of pills

(R. 198-199, 231, 297). He did not have any information that Joyce was mentally ill or mentally disturbed (R. 198, 201, 297, 304). He was aware that Joyce at one time had been taken by her mother to a psychiatrist, but did not know the reason (R. 201, 304).²⁴

Kardy knew that a rape complaint had been made in Prince George's County involving Joyce Roberts; but he was also aware that the charge was not made by Joyce, and that the matter was investigated and dropped (R. 252-253, 297). He also knew that Joyce had been hospitalized for taking excessive drugs; but he had no information that this was a suicide attempt (R. 251-252, 297). He did not inquire into what caused the drugs to be taken (R. 252), and suspected it might have been connected with the occurrence of July 20, 1961 (R. 252, 290). He had no information that Joyce was mentally or emotionally disturbed (R. 250, 253).

Neither Whalen nor Kardy had any knowledge of facts concerning the "near probation status" of the prosecutrix (R. 206, 246, Petitioners' Brief, p. 13). The facts concerning this were known only by Juvenile Court authority in Prince George's County (Petitioners' Brief, p. 34).

We claim that there was no due process violation because of the failure of "the prosecution" to relay the information which it may legitimately be charged with knowing.

B. THE ALLEGED LACK OF DEFENSE KNOWLEDGE

The Petitioners deny that they had any obligation to seek the allegedly suppressed evidence, or that they are chargeable with knowledge of any such evidence (Peti-

²⁴ Mrs. Marion Roberts, mother of Joyce, corroborated the testimony of Whalen. See footnotes Nos. 13 and 14, *supra*.

tioners' Brief, pp. 19-21, 39-40). However, all of the information allegedly suppressed was available to a diligent defense.

Much attention is directed by the Petitioners to the fact that the Montgomery County State's Attorney allegedly violated a duty owed to them by not advising them about what he knew, and what he should have known or should have discovered by "rudimentary diligence" (Petitioners' Brief, p. 35). The basic fact, however, which is conveniently overlooked, is that the State's Attorney for Montgomery County turned over his entire file to defense counsel for close scrutiny (R. 214-215; 260-62). In the file lay the name of Detective H. Lloyd Whalen, the man in charge of the investigation of the case; the man who received the original telephone call from the father of the prosecutrix concerning the incident now allegedly suppressed, the man who knew that Joyce Roberts had taken some sleeping pills and was hospitalized; the man who knew that Mrs. Roberts had taken her daughter to a psychiatrist, the man who was available for questioning by the defense; but the man who was not questioned.

In fact, although defense counsel had been advised of the names of all prospective State's witnesses (R. 261), there is no indication in the record that the defense sought to interview any of them other than Joyce Roberts. Once permission to interview Joyce was denied by her mother, counsel made no further attempt to speak with her and made no effort whatsoever to seek assistance to that end. Nor did defense counsel make an attempt to comply with the Maryland requirement that written permission of the Juvenile Courts be obtained before records of such courts may be examined (Maryland Rule 922, Appendix A, *infra*); and no request for assistance was made of the State's Attorney who testified that had such a request been made

of him, he would have helped defense counsel obtain the information sought (R. 261-262).

The Court of Appeals aptly pointed out: "By the Gileses version of the incident of July 20, 1961, as related to their attorney, the defense certainly had some question as to the character of the prosecutrix which properly could have been investigated. In view of this and as evidenced by the examination of witnesses at the criminal trial, the defense must have known of the prosecutrix's general reputation for unchastity and that she was a sexually promiscuous girl" (R. 306).

There should be no duty on the prosecution to disclose evidence that is available to the accused. See *Jordon v. Bondy*, 114 F. 2d 599 (D.C. Cir.). The defense may be as well able to explore outside sources of information as the prosecution. *United States v. Lawrenson*, 298 F. 2d 880 (4th Cir.). See also *United States v. Garsson*, 291 F. 646, 649.

Further, in *Brady v. Maryland*, 373 U.S. 83, 87, it was stated:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis supplied.)

The following appears later in the same opinion:

"A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." (Emphasis supplied, 373 U.S. at 87-88.)

From the above it is clear that, under the circumstances of this case as herein outlined, a defense request for disclosure is a prerequisite to application of the suppression doctrine. It is also clear that there was no such request in the case at bar (Petitioners' Brief, pp. 19-20).

C. THE CASE CONSIDERED IN PROPER PROSPECTIVE

In order to grant relief to the Petitioners in this case this Honorable Court must hold, in effect, that the due process clause of the Fourteenth Amendment imposes upon State prosecuting authorities the duty not only of representing the public, but also of representing an accused to the extent of not only disclosing, but also discovering evidence which might be considered useful. The Petitioners seek to have this obligation imposed regardless of the admissibility of the evidence, its merely cumulative effect, its equal availability to the defense, and its probable probative effect. The Respondent maintains that the due process clause does not impose so broad an obligation.

The claim is made that in all suppression of evidence cases the test to be applied is "whether the undisclosed evidence, if revealed, might have affected the outcome of the trial" (Petitioners' Brief, pp. 21-22).²⁵ Stripped of its

²⁵ The rule sought by the Petitioners is similar to the one applied by the federal courts, where a new trial is sought on the ground of newly discovered evidence, and is limited only to cases of "recantation or where it has been proved that false testimony was given at the trial." *United States v. Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y.), aff'd 201 F. 2d 372 (2d Cir.); *Kyle v. United States*, 297 F. 2d 507 (2d Cir.); *Larrison v. United States*, 24 F. 2d 82 (7th Cir.). In other situations where a new trial is sought the federal courts have generally applied the rigorous rule announced in *Berry v. State of Georgia*, 10 Ga. 511, 527, i.e. "the newly discovered evidence would probably produce an acquittal." *Johnson v. United States*, 32 F. 2d 127, 130 (8th Cir.). Under either rule many additional factors are to be considered.

obscuring verbiage, the Petitioners' claim is one that would require all State authorities (not only those actively engaged in the prosecution) to become co-counsel for the defense. They allege that any useful information (not evidence) withheld by any official of the State amounts to a denial of due process if the State official had knowledge of the information and the defense did not. They seek a rule nearly without limitation; one in which other equally important factors are overlooked; one in which any evidence that "might" have an effect upon the outcome of a criminal trial shall be considered material regardless of whether the evidence is admissible and useful in the sense that it contradicts trial evidence; regardless of whether the evidence was actually known by the prosecution; and regardless of whether an accused may be prejudiced.²⁸ In determining materiality these factors must of necessity be considered.

Especially when considered in light of the evidence presented in the case at bar, such a rule as that sought by the Petitioners would have an untoward effect upon the conduct of criminal prosecutions and would even tend to perhaps put a premium on slovenly trial preparation by defense counsel. Applied to the facts of this case it would mean that any State official with information concerning a participant in a State criminal trial would have the duty of invariably disclosing such information or else run the risk of a court, at some later date after trial and appeal,

²⁸ Prejudice to an accused is said to be one of the central matters of inquiry. *Barbee v. Warden*, 331 F. 2d 842. See Note, 60 Col. L. Rev. 858 (1960). *The Duty of the Prosecutor to Disclose Exculpatory Evidence*. The author there suggests that if a rule is to be applied to cases dealing with the passive non-disclosure of evidence it would be "whether it is reasonably likely that a different result would have been reached." 60 Col. L. Rev., *supra*, at p. 863. This test is not far removed from the "would probably" standard of *Berry v. State of Georgia*, *supra*, footnote 25.

ruling that such information may have helped the defense, and that the failure to disclose it was a "suppression." It would, at the very least require all prosecutors to throw open their complete files to all defendants and allow them to pick and choose for a defense. This would apply regardless of whether under available rules of discovery and inspection the information could legitimately be obtained."

Ultimately it would mean that the State, to be secure, must investigate for a defendant or run the risk of the defendant later claiming he was not aware of any particular bit of information, and that such information was suppressed, irrespective of the lack of due diligence in preparing his own case. We do not think the Constitution contemplates any such action.

We maintain that whatever the proper test may be, the one sought by the Petitioners is improper. This is so not only because of the broad implications that may be read into it, but also because the due process clause, as it has been interpreted in cases dealing with the passive non-disclosure of evidence, has at its roots the desire only to avoid a trial that may be said to be fundamentally unfair.

Failure to disclose evidence that would have completely exonerated the accused, *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill.); knowing use of perjured testimony, *White v. Ragan*, 324 U.S. 760; *Pyle v. Kansas*, 317 U.S. 213; *Curran v. Delaware*, 259 F. 2d 707 (3d Cir.); failure to correct false testimony, *Napue v. Illinois*, 360 U.S. 264; *Alcorta v. Texas*, 355 U.S. 28, are all clear examples of conduct constituting a denial of due

²⁷ Rule 728 of the Maryland Rules of Criminal Procedure is set forth in Appendix A, *infra*. The Maryland rule is patterned after Federal Rule 16 of the Federal Rules of Criminal Procedure. See *Kardy v. Shook*, 237 Md. 524, 207 A. 2d 83.

process. The guarantee of due process extends beyond the examples enumerated but the criteria that render other conduct in this area constitutionally impermissible have not been clearly defined. See generally, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 Col. L. Rev. 858 (1960). What is made clear, however, is that the object is not a perfect trial, but only the avoidance of an unfair trial. *Brady v. Maryland*, 373 U.S. 83. The authorities have recognized that in finding a violation of due process the State action must go "beyond the line of tolerable imperfection" and thus fall into the area of fundamental unfairness. *Curran v. Delaware*, 259 F. 2d 707 (3d Cir.); *Barbee v. Warden*, *supra*. The due process clause clearly does not make mandatory a trial free of all error. "Tolerable imperfection", though not necessarily desirable, is acceptable. We claim that in this case "the line of tolerable imperfection", if approached at all, has not been violated. No amount of eloquence or strained semantics on the part of the Petitioners can convert the action of the prosecution in the case at bar into action fundamentally unfair or violative of due process of law.

A great many cases are cited by the Petitioners in support of their contention. Yet an analysis of those cases shows that the evidence suppressed was directly contrary to testimony on behalf of the State or evidence introduced by the State, or directly supported testimony on behalf of the defense or evidence introduced by the defense. In other cases the conduct of the prosecution was clearly reprehensible.²⁴ The evidence in the instant case was not

²⁴ The cases relied on by the Petitioners are easily distinguishable from the case at bar. For example, in *Napue v. Illinois*, 360 U.S. 264, the improperly suppressed evidence concerned the prosecutor's promise of leniency to a witness who denied on the stand that he had been promised the same. In *Brady v. Maryland*, 373 U.S. 83, a statement of a co-defendant was purposely withheld by the State

of this character but dealt with specific acts (an alleged false rape claim and an alleged suicide attempt) relating remotely to the credibility of the prosecuting witness and was not directly contradictory of any item of her testimony at the trial.²⁰

1. The Alleged False Rape Claim.

To hold that the prosecution was fundamentally unfair in this case would be to write into the law an entirely new suppression rule. That such should spring from the facts

in which the co-defendant admitted killing the victim. This was the contention of the defendant. In *Barbee v. Warden*, 331 F. 2d 842 (4th Cir.) a police department ballistic report and fingerprint tests which cast grave doubt upon the accused's involvement in the crime were suppressed. In *Griffin v. United States*, 183 F. 2d 990 (D.C. Cir.) the principal defense of the accused was that the deceased had attacked him and the evidence suppressed concerned an open knife in the pocket of the deceased. In *United States ex rel. Thompson v. Dye*, 221 F. 2d 763 (3d Cir.) the defense in the case was that the accused was intoxicated. The prosecution called to the stand a police officer who testified that the defendant did not appear intoxicated to him, but did not call to the stand a policeman who would have testified to the contrary. This case was made worse by the fact that the prosecution stated that all of the officers would testify to the same effect as the officer called. In *United States ex rel. Almeida v. Baldi*, 195 F. 2d 815 (3d Cir.) the State produced evidence tending to show that the defendant had fired the fatal shot, while the State deliberately suppressed evidence to the contrary. In *United States ex rel. Montgomery v. Ragon*, 86 F. Supp. 382 (N.D. Ill.), the defendant had been prosecuted for rape, and the undisclosed evidence was a report of a medical examination of the prosecutrix which showed that she was not raped. In *Griffin v. United States*, *supra*; *Napue v. Illinois*, *supra*; *United States ex rel. Almeida v. Baldi*, *supra*; *United States ex rel. Thompson v. Dye*, *supra*; and *People v. Savvides*, 1 N.Y. 2d 554, 136 N.E. 2d 853, it should be noted that the prosecutor himself had full knowledge of the information that was withheld. In *Curran v. Delaware*, 259 F. 2d 707 (3d Cir.), a high ranking police officer in charge of the investigation destroyed statements of defendants which would have substantiated their claim, and the officer also gave perjured testimony.

²⁰ If knowingly false testimony had been offered concerning these incidents credibility would be an appropriate subject of inquiry. See *Napue v. Illinois*, *supra*; and *People v. Savvides*, *supra*.

of this case is unwarranted. The alleged rape claim by the prosecutrix turned out to be not only not made by the prosecutrix but actually denied by the prosecutrix in her statement to Detective Wheeler. She stated that she had not made a claim of rape, was not making one, and if the charges were placed she would refuse to testify (R. 190, 184). Even in those States where evidence of a false rape claim is admissible, the claim must in fact be made, and by the prosecutrix. 58 Am. Jur., Witnesses §682; Annotation, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Similar Charges Were Made Against Other Persons*, 75 A.L.R. 2d 508. The record shows that the prosecutrix did not make a complaint. Therefore, she cannot be said to have made a false rape claim. There was no evidence from which a conclusion could have been drawn that since a false rape claim was made by the prosecutrix on one occasion it raised doubt as to the validity of the claim against the Petitioners.

Also, in Maryland, specific acts of misconduct are not admissible to affect the credibility of a witness. *Shartzer v. State*, 63 Md. 149; *Humphreys v. State*, 227 Md. 115, 175 A. 2d 777. There is no requirement that the victim of the crime of rape be chaste, for the crime is the same to force even a concubine or harlot, *Humphreys v. State*, *supra*; 4 Blackstone, Commentaries 213. Evidence in regard only to the general reputation of the prosecutrix for truth and veracity, or for chastity is admissible in Maryland, not evidence of specific acts of intercourse with others. *Shartzer v. State*, *supra*; *Humphreys v. State*, *supra*. In *Rau v. State*, 133 Md. 813, 105 A. 887, it was held that evidence of a prior false rape claim was not admissible to impeach the credibility of the prosecuting witness.

The Petitioners argue, however, that the alleged rape accusation would have been admissible to impeach Joyce Roberts' credibility as indicative of mental illness or emotional disturbance (R. 25). They claim that her conduct was indicative of nymphomania, a type of mental illness, and cite cases in which such evidence was held admissible. This allegation is completely unsupported by the record, and, as the Court of Appeals pointed out, "to conclude that such an illness existed in the case at bar would be to engage in sheer speculation and conjecture" (R. 307). Further, even assuming that the prosecutrix may be said to have been suffering from nymphomania, there is nothing in the record to show either that she consented to the acts of the Petitioners because of this or that her competency as a witness was impaired.

The only possible use the defense could make of the facts surrounding the incident of the alleged false rape claim would be to show what the defense already knew, that the prosecutrix was *enchaste*. Thus, at most, this evidence was merely cumulative.²²

2. The Alleged Suicide Attempt.

We have already pointed out that at the time of the criminal trial the prosecution did not have actual knowledge that Joyce Roberts had attempted suicide. The prosecution knew only that she had taken an overdose of pills and was hospitalized. Therefore, unless the knowledge of Sergeant Wheeler along with the contents of the report of the Prince George's General Hospital may be imputed to the prosecution, there is no basis upon which a sup-

²² "Merely cumulative or impeaching" evidence is not sufficient to support a motion for new trial on the grounds of newly discovered evidence in the federal courts. See *Masarik v. United States*, 352 U.S. 1; *Johnson v. United States*, 32 F. 2d 127 (8th Cir.).

pression claim may be founded. Further, even if this knowledge may be said to be chargeable to the prosecution, failure to divulge it did not deny the Petitioners any constitutional right.

At the post-conviction hearing there was no evidence that anyone connected with the State in any capacity was aware of the contents of the record of the Prince George's General Hospital which contained the only evidence that Joyce Roberts had attempted suicide. Not a single witness testified that the overdose of pills taken by the prosecutrix was in fact an attempted suicide or was so told by the prosecutrix. The significance of the failure of the Petitioners to have the prosecutrix and the treating psychiatrist testify should not go unnoticed. Joyce Roberts was the singularly most knowledgeable person who could testify as to whether she had in fact attempted to commit suicide. The only other witness who could testify on the matter was her psychiatrist, whose testimony the Petitioners did not think sufficiently important to require the hearing continued until he could be available to testify. Mrs. Marion Roberts, mother of Joyce, even disclaimed knowledge that her daughter had taken the pills in a suicide attempt. (Footnote No. 13, *supra*). Sergeant Wheeler never relayed his information to the prosecution.

Assuming the attempted suicide to have been proven as such, the Petitioners claim that alleged evidence would be admissible to show that the prosecutrix was mentally incompetent as a witness and to impeach her credibility. As already pointed out, in Maryland credibility must ordinarily be attacked by evidence of general reputation for truth or veracity or material contradictory facts. Also, as the Court of Appeals pointed out, even if the defense had known of all the information later established, the record did not disclose a legally sufficient basis upon which an

opinion could be predicated that she was either mentally incompetent on the date of trial or that her testimony was not to be believed. A psychiatrist, who had not examined the prosecutrix, related in answer to a hypothetical question, that in his opinion, a teen-ager's attempted suicide evidenced a mental disorder. He pointed out, however, that many conditions not derived from mental illness could cause an attempted suicide. He further admitted that he could not state an opinion as to the girl's mental condition at the date of the trial (R. 237-243). The record is devoid of evidence that the prosecutrix was unable to perceive and describe accurately what had transpired, or that she was in any way biased against a class (men) to which the accused belong, as the Petitioners claim.

The prosecutor, with the limited information he had at the time; thought that the incident may have been related to the rape in which the Petitioners were involved. The hospital record (of which the prosecutor had no knowledge) even stated: "Patient raped several weeks ago" (R. 280). Certainly it would not be unreasonable for a jury to conclude that an attempted suicide by a teen-ager was an indication of emotional disturbance caused by an attack upon her by the Petitioners. Yet, had the prosecution sought to introduce any evidence as such, the defense would certainly have claimed it to have been prejudicial.

Since the proof introduced at the post-conviction hearing actually showed that the alleged suicide attempt was the outgrowth of an incident totally unrelated to the one for which the Petitioners were convicted of rape, its probative value was lacking. In light of the fact that this evidence in no way mounted up to showing the prosecutrix was incompetent as a witness, or in any way would have contradicted any of her trial testimony, any suppression did not amount to a denial of due process.

Evidence tending to show a mental condition resulting in a suicide attempt or mental treatment at a time prior to the trial, and not contemporaneous to the matter being testified about, should not be admissible as impeaching the credibility or reliability of a witness. See *Garrett v. State*, 105 So. 2d 541 (Ala.).²¹

The dangers of a contrary rule far outweigh any salutary effect that may be obtained. If such a requirement existed, for example, victims of sex crimes might be deterred from disclosing such offenses. Such a rule would also lead to the opening of the trial courts to a continuous parade of psychiatric experts, who could neither testify to the guilt or innocence of the accused, who could never testify positively to the veracity of the testimony offered by the witness, and whose only usefulness would be to ponder the "hypotheticals" of whether or not the witness may tend to fabricate. The inexact nature of psychiatric science gives no assurance that such a process would lend assistance in the search for truth. See *United States v. Dildy*, 39 F.R.D. 340.

²¹ Cases relied on by the Petitioners evidencing a contrary result are not persuasive. For example, *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342, apparently the only case directly stating that evidence of a suicide attempt is admissible to attack a witness' credibility, approved the rule without citation of authority. In *People v. Cowles*, 246 Mich. 429, 224 N.W. 387, opinion evidence that the prosecutrix was a pathological falsifier, a nymphomaniac, and a sexual pervert was admitted without objection. In *Ashley v. Texas*, 319 F. 2d 80 (5th Cir.), the state suppressed evidence of two psychiatrists that the defendants were insane and therefore unable to even stand trial. In *Powell v. Wiman*, 287 F. 2d 275 (5th Cir.) the prosecution suppressed evidence of the insanity of a witness and also evidence of a statement made by the witness to the prosecutor in contradiction of trial testimony.

3. The "Near-Probation Status" of the Prosecutrix.

The Petitioners' claim concerning the "near-probation status" of the prosecutrix, determined adversely to the Petitioners in both the Court of Appeals and the post-conviction trial court, is devoid of merit, there being nothing in the record to show a withholding of evidence concerning this issue, even assuming, for argument purposes, it to be significant. The Petitioners admit that neither the State's Attorney nor the police of Montgomery County had any knowledge of facts concerning this matter (Petitioners' Brief, p. 13).

Also, juvenile court records were available to defense counsel under the procedure set out in Rule 922 of the Maryland Rules of Procedure (Appendix A, *infra*).

II.

THE DECISION OF THE MARYLAND COURT OF APPEALS DID NOT DENY PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Petitioners erroneously indicate (Petitioners' Brief, p. 40) that the Maryland Court of Appeals "virtually conceded" that the evidence concerning the second rape accusation and attempted suicide was admissible in evidence, and therefore argue that they were denied the equal protection of the laws in view of Maryland's provisions that the jury is the judge of both the law and the facts (Maryland Constitution, Article XV, §5, Appendix A of Petitioners' Brief). They claim that the Maryland Court of Appeals substituted its appraisal of the exculpatory value of the allegedly suppressed evidence for that of the jury in an "erratically selected" class of cases. The simple answer is that the Maryland Court of Appeals did not hold, nor did it "virtually concede", that such evidence was admissible. The Court

pointed out that specific acts of misconduct are not admissible to affect the credibility of a witness in Maryland, for such must be attacked by evidence of general reputation for truth or veracity or material contradictory facts; and that when consent is at issue, only general reputation for unchastity is admissible in evidence, and specific acts of misconduct are not admissible to establish lack of chastity (R. 306). What the Court did state is that even *assuming* the evidence were admissible, for the purposes of argument, it was not material or exculpatory as a matter of law, and failure to disclose any such evidence, admissible or not, did not amount to a denial of due process (R. 304-306). The Court then did not substitute its judgment for that of the jury, for despite the Maryland provision on the authority of the jury, *supra*, the courts have retained the power to determine the admissibility of evidence. See *Brady v. Maryland*, *supra*, where it was pointed out that "Maryland's constitutional provision making the jury in criminal cases 'the Judges of Law' does not mean precisely what it seems to say," (373 U.S. at p. 89), and that it is the court, not the jury, which passes on the admissibility of evidence."²²

More importantly, in *Giles v. Maryland*, 372 U.S. 767, this Honorable Court dismissed "for want of a substantial federal question" an attack by these Petitioners upon the constitutionality of this same provision. That decision involved an adjudication on the merits — with all of its consequences.

²² The changes which have been made in the Maryland doctrine since its initial passage are well known to this Honorable Court. See *Brady v. Maryland*, *supra*; *Giles v. Maryland*, 372 U.S. 767.

III.

THE MARYLAND PROCEDURAL RULE WHICH REQUIRED TIMELY NEW TRIAL MOTIONS BASED UPON NEWLY DISCOVERED EVIDENCE DID NOT DENY THE PETITIONERS DUE PROCESS OF LAW.

Even assuming that this issue is properly before the Court (see footnote 23, *supra*), it affords no ground for relief. Petitioners contend that under Rules 567a and 759a of the Maryland Rules of Procedure (App. A 3 of Petitioners' Brief), newly discovered evidence is not available as a ground for setting aside a conviction unless a new trial motion is filed within three days after verdict. Such a claim is now moot under Maryland Rule 764 (Appendix A *infra*), which became effective September 1, 1965. Under Maryland Rule 764, Section b, subsection 2, a new trial on the ground of newly discovered evidence which by due diligence could not have been discovered within three days after verdict may be granted if a motion is filed within ninety days after the imposition of a sentence or within ninety days after receipt by the trial court of a mandate issued by the Court of Appeals upon affirmance of the judgment or dismissal of the appeal.

In any event, regardless of any procedural time limit, this Court has stated that there is no constitutional right to a new trial based upon newly discovered evidence. In *Townsend v. Sain*, 372 U.S. 293 at p. 317 it was said:

"... [T]he existence of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief on federal habeas corpus."

Such a statement could not have been made if due process required a new trial on newly discovered evidence. See also *Brown v. State*, 237 Md. 492, 498, 207 A.2d 103, where it is pointed out that due process does not guarantee one

the right to file a motion for new trial after conviction for a criminal offense; and *Griffin v. Illinois*, 351 U.S. 12, 18, stating there is no due process right even to an appeal. Also see *Cobb v. Hunter*, 167 F. 2d 888 (10th Cir.).

The Petitioners' citation of Rule 33 of the Federal Rules of Criminal Procedure permitting two years after final judgment for a Motion for a New Trial based upon newly discovered evidence to be filed argues to the contrary of the proposition advocated by the Petitioners since under their theory any time limitation on such a motion would be a violation of due process. Under their theory Rule 33 is just as unconstitutional as the Maryland Rule.

CONCLUSION

For the above reasons the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

STATUTES AND RULES INVOLVED

Rule 728 of the Maryland Rules of Procedure (Vol. 9B, Md. Ann. Code, 1957) provides:

"Rule 728. Discovery and Inspection.

a. Generally.

Upon motion of a defendant and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the Court, at any time after indictment, may order the State's Attorney or other person pursuant to an order to be passed as provided by section b of this Rule:

1. Objects from Defendant or by Process.

To produce and permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or by process.

2. Defendant's Statements.

To furnish the defendant the substance of any oral statement made by him which the State proposes to produce as evidence to prove its case in chief, a copy of any written statement made by him, and the substance of any oral confession made by him.

3. Names of Witnesses.

To furnish the defendant a list of the names and addresses of the witnesses whom the State intends to call to prove its case in chief.

b. Form of Order.

An order under this Rule shall specify the time, place and manner of making the production, inspection, observations and of taking the copies and photographs and may prescribe such terms and conditions as are just.

c. Common Law Discovery Preserved.

Nothing in this Rule shall limit the inherent common law power of the court to require or permit discovery."

Rule 764* of the Maryland Rules of Procedure (1965 Cum. Supp.) provides:

"Rule 764. Revisory Power of Court.

a. Illegal Sentence.

The court may correct an illegal sentence at any time.

b. Modification or Reduction — Time for.

1. Generally.

For a period of ninety (90) days after the imposition of a sentence, or within ninety (90) days after receipt by the court of a mandate issued by the Court of Appeals upon affirmance of the judgment or dismissal of appeal, or thereafter, pursuant to motion filed within such period, the court shall have revisory power and control over the judgment or other judicial act forming a part of the proceedings. The court may, pursuant to this section modify or reduce, but shall not increase the length of a sentence. After the expiration of such period, the court shall have such revisory power and control only in case of fraud, mistake or irregularity.

2. Newly Discovered Evidence.

The court may, pursuant to a motion filed within the time set forth in subsection 1 of this section, grant a new trial or other appropriate relief on the ground of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under section a of Rule 759 (Motion after Verdict)."

* Rule 728 and Rule 764 are included in chapter 700, entitled "Criminal Causes." Rule 764, section b, subsection 2 was added by a 1965 amendment, effective September 1, 1965.

Rule 922 of the Maryland Rules of Procedure appears in Chapter 900, entitled "Juvenile Causes". It provides as follows:

"Rule 922. Records—When May Be Examined.

A person having a direct interest in a case may examine any part of the record thereof, except medical and case histories and other reports which the court may designate confidential. Such person may also examine such histories and confidential reports with prior written permission of the court. The court may, however, from time to time, designate by general orders persons or agencies who may inspect any record, or specific classes of records, without additional written permission. Except as provided herein, no other person may examine any juvenile record, including the docket, without prior written permission of the court."